92-1171

NO.:

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BRADLEY McLINN, PETITIONER,

vs.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE FIFTH CIRCUIT ERRED IN DENYING PETITIONER'S MOTION FOR PRODUCTION OF DOCUMENTS DISCOVERABLE AS JENCKS AND BRADY MATERIAL WHICH WAS IN THE GOVERNMENT'S POSSESSION.

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I.

OFFICIAL REPORTS OF OPINIONS

Although a written opinion has been provided to counsel, there has not yet been an official published opinion.

II.

JURISDICTION

Judgment was entered by the United States Court of Appeal, for the Fifth Circuit, on August 10, 1992. A petition for rehearing was denied on September 10, 1992. This Court has jurisdiction pursuant to Article III, §2, Clause 1 of the United States Constitution.

III.

CONSTITUTIONAL PROVISIONS

The issue presented before this Court implicates a defendant's Fifth Amendment right to Due Process.

United States Constitution, Fifth Amendment:

> No person shall...be deprived of life, liberty or property, without due process of law.

IV.

STATEMENT OF THE CASE

On June 20, 1991, petitioner, BRADLEY MCLINN, was convicted by a jury in the United States District Court for the Eastern District of Louisiana on one count of knowingly distributing in excess of 50 grams of cocaine base in violation of 21 U.S.C. 846, and five counts of distributing base cocaine through the United States Mail in violation of U.S.C. 843(b). Petitioner's motion for Judgment of Acquittal at the conclusion of the prosecution's case was denied by the Court. Appellant moved again for Judgment of Acquittal or New Trial after the trial. On the day of sentencing, November 6, 1991, the District Court denied this motion. The petitioner filed a timely Notice of Appeal on November 6, 1991. On August 10, 1992, the Fifth Circuit Court of Appeals affirmed the judgment of the District Court. Immediately thereafter, the petitioner requested a petition for rehearing.

Petitioner's motion for rehearing was denied on September 10, 1992.

V.

STATEMENT OF THE FACTS

On March 7, 1989, James Williams was arrested after receiving an express mail package that contained 670 grams of rock cocaine. Alan Baber and James Williams testified against petitioner McLinn as government witnesses pursuant to plea agreements.

Before the commencement of trial and during the course of the trial, the petitioner sought the production of certain witness statements in the Government's possession, namely, (1) a memorandum interview of James Williams dated March 7, 1989, prepared by Postal Inspector G.C. Kay, (2) a DEA-6 on debriefing of James Williams, prepared on March 18, 1991, by Special Agent Arthur Richards of the DEA, and (3) a DEA-6 relating to the debriefing of Alan Baber, prepared

March 12, 1991, by Special Agent Arthur Richards.

The prosecution admitted there were reports relating to these witnesses but stated they were not Jencks. The trial court promised to inspect the reports to determine whether they were Jencks producible at the luncheon recess.

For no apparent reason, the trial court reneged on it promise to inspect the statements for Jencks production despite the prosecution's offer to produce them to the Court for its determination. At the hearing on petitioner's motion for new trial, the district court conceded that the record doesn't reflect that the documents were actually produced in camera. Without even looking at the three reports at issue, the trial court denied defense counsel's request for the production of the claimed Jencks material and simply ordered the prosecution to file the reports after the conclusion of the trial. Further, the trial court ordered

defense counsel not to ask any questions of any witnesses designed to determine whether the statements had been adopted by the witness.

The government introduced evidence that fingerprints on five of the labels matched petitioner's prints, and a handwriting expert testified that the labels appeared to have been written by petitioner McLinn.

Petitioner McLinn testified on his own behalf. He did not deny addressing the labels and mailing the packages that are the subject of his prosecution. McLinn stated that he had agreed to mail certain packages for Alan Baber, with the understanding that he would receive $100 for each package mailed. Baber would provide McLinn with the addresses of the senders and recipients. McLinn believed the packages contained expensive jewelry.

After trial, the prosecution did produce the documents in question, and upon review, the district court held that the interview reports were not Jencks material. However, the

district court's findings were based simply upon examining the documents themselves. The district court did not provide petitioner the opportunity to elicit testimony concerning whether the statements were adopted.

The jury returned a verdict of guilty as to the count of knowingly distributing in excess of 50 grams of cocaine base in violation of 21 U.S.C. 846, and five counts of distributing base cocaine through the United States Mail in violation of 21 U.S.C. 843(b). The petitioner was sentenced to 188 months for count one and to 48 months for counts two to six to run concurrently. The appellate court affirmed the decision of the trial court.

VI.

CURRENT STATE OF THE LAW

While Jencks Act violations are normally non-constitutional error, where the appellant's conviction rests heavily on the credibility of a single accomplice, the unproduced Jencks material may well implicate confrontation clause or compulsory process issues.

United States v. Wallace, 848 F.2d 1464, 1471 (9th Cir. 1988).

The Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure require the Government to furnish criminal defendants with all "statements" of witnesses which relate to the subject of the witness' trial testimony after direct examination. 1800 U.S.C. §3500(b); Fed. R. Crim. P. 26.2(c).[1]

It is the function of the trial court to determine the issue of probability, i.e., to decide whether the reports in question constitute a "statement" within the meaning of the Act. United States v. Bell, 457 F.2d 1231, 1235 (5th Cir. 1972).

If the government claims that any statement ordered to be produced contains matter

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[1]The Act and the Rule define a statement as:

(1) a written statement made by said witness and signed or otherwise adopted by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement;...

which does not relate to the subject matter of the witness' testimony, the statute provides that the court "shall" order the government to deliver the statement for inspection by the court in camera. 1800 U.S.C. §3500(b); Fed. R. Crim. P. 26.2(c). Denial of a motion to produce Jencks Act materials is erroneous if based solely on government counsel's assertion that the undisclosed materials do not constitute "statements" covered by the Jencks Act. United States v. Conroy, 589 F.2d 1258, 1273 (5th Cir.), cert. denied, 100 S.Ct. 60 (1979). Jencks Act is violated when the government withheld prior statement of a witness until close of case. United States v. Jackson, 649 F.2d 967, 971-972 (3rd. Cir. 1981).

If there is a dispute between the government and defense counsel as to whether the documents are "statements" as defined by the Jencks Act, the presumption should be that the district court should hold an in camera hearing and after reviewing the documents make

a determination of what should be turned over to the defendants. United States v. Allen, 798 F.2d 985, 994 (7th Cir. 1986).

In order to trigger the presumption in favor of an in camera inspection, the defendant need only have a reasonable argument that if the document says what he believes it says, based on the testimony of the witness on direct examination, then it can possibly be used to impeach the witness. Allen, supra, 798 F.2d at 995. Since defense counsel has not had the opportunity to see the disputed document at the time of the request, he need only lay a minimal foundation for its possible use as a Jencks statement. Id. Here, defense counsel laid a foundation as to the August 9, 1990 Memorandum of Interview which was produced. The court, however, would not allow counsel to lay such a foundation with respect to the other documents. Such a refusal mandates reversal of Appellant's convictions. See United States v. Pierce, 893 F.2d 669, 675 (5th Cir. 1990) (the district court has a

duty to inspect documents in camera if some indication exists in the record that the notes meet the Jencks Act definition of a statement).

Because the in camera inspection of the requested documents was not made, the trial court was unable to adequately determine whether or not the reports contained substantially verbatim recitals or whether the reports were signed or otherwise adopted by the witness. Thus, defense counsel attempted to meet his burden of establishing adoption by showing that the witness read the report, or had it read to him, and then noted his approval. See United States v. Merida, 765 F.2d 1205 (5th Cir. 1985) (defense counsel entitled to a statement-adoption hearing when court precludes defendant from establishing adoption during trial). Although counsel began questions along these lines, the court, upon the prosecution's objection, refused to allow defense counsel to continue on this line of questioning. The prosecution had provided

defense counsel with the second Memorandum of Interview of James Williams during the trial. Defense Counsel thereafter questioned Inspector Kay about the Interview and laid a foundation establishing adoption and approval of the statement. This testimony alone should have compelled the trial court to allow counsel to inquire of the adoption of the statement contained in the first Memorandum of Interview seeing as both interviews were conducted by Postal Inspector Kay, and thus presumably were conducted in the same fashion.

Whether a document is an original statement made by the witness, as described in the first sentence of the statutory definition, or a "substantially verbatim" copy as described in the second sentence of the definition, the emphasis clearly is on whether the statement can fairly be deemed to reflect fully and without distortion the witness' own words. Goldberg v. United States, 96 S.Ct. 1338 (1976). Adoption or approval can be shown by demonstrating that the interviewer read back

to the witness what he wrote and that the witness affirmatively stated his approval. Id.; see also United States v. Hogan, 763 F.2d 697 (5th Cir. 1985); United States v. Pierce, 893 F.2d 669, 675 (5th Cir. 1990) (defense counsel must be given the opportunity to qualify interview notes as a statement under §3500(e)(i) through inquiry as to whether the witness signed, read, or heard the entire document read).

While an agent's interview notes are not "statements" within the meaning of §3500(e)(1) unless the witness approved the notes after the notes were read to the witness in their entirety, a witness may ratify an interview report, for purposes of this section in piecemeal manner by response to number of inquiries as effectually as by single generalized response. U.S. v. Scaglione, 446 F.2d 182, 184 (5th Cir. 1971).

In the instant case, the trial court failed to discharge its responsibilities by denying defense counsel requests for an in

camera hearing and refusing to allow defense counsel the opportunity to establish through the testimony of the witnesses who made the statements that they had in fact adopted or approved them.

The majority opinion held that the district court's post-trial findings were not clearly erroneous. The appellate court admitted that it would be preferable "for the district court to examine witnesses briefly outside the presence of the jury to determine whether the witness had read or heard the interview notes and whether the witness had later indicated that he verified the accuracy of the notes." But, the majority opinion noted that since the appellant never clearly requested a statement adoption hearing, the district court was not obligated to hold one. While the appellate court in United States v. Merida, 765 F.2d 1205, 1216 (5th Cir. 1985), did state that a request for an in camera hearing may not be taken as a request for a statement adoption hearing, the trial court

in Merida had, in fact, held an in camera hearing. Although the trial court is not obligated to hold a statement adoption hearing, the Supreme Court has stated: "Under this section governing production of statements made to government agents by government witnesses in criminal cases, it is the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself **may or must** be offered to prove the nature of the statement." Palermo v. United States, 360 U.S. 343, 354-355 (1959) (emphasis added). The court must conduct any inquiry which is necessary to aid the judge to discharge the responsibility laid upon him to enforce this section. Leach v. U.S., 320 F.2d 670 (1963).

The majority opinion noted that "the court never ruled that McLinn could not examine the witnesses outside the presence of the jury on the Jencks Act issue." However, the appellate court overlooks the question of whether the district court would grant

a request to hold a full-blown statement adoption hearing when it would not even conduct the required in camera hearing. Since the trial court adamantly refused to adhere to the lawful provisions of the Jencks Act, defense counsel was forced to abandon its attempts to demonstrate that documents in question need be disclosed. Instead, defense counsel sought to lay the foundation for an appeal.

Not only should have the three withheld statements been produced for trial as Jencks material, but also the court should have required the government to produce the statements as discoverable Brady material. The government's failure to disclose the three requested memorandums denied the petitioner due process under Brady v. Maryland, 83 S.Ct. 1194 (1963). The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment. Id. The failure to disclose

impeaching evidence can constitute a Brady violation. Giglio v. United States, 405 U.S. 150, 154 (1972).

In the instant case, the nondisclosed evidence does contain material impeaching information. Baber and Williams were undoubtedly the most important prosecution witnesses and the information in the DEA-6s and Memorandum of Interview would have had a definite impact on their credibility.

Here, the majority opinion dismissed the impeachment value of the documents as insignificant although the court admits that the nondisclosed information includes the significant impeaching evidence that initially Williams lied to Inspector Kay about the contents of a package. Williams had told Kay that the parcel contained jogging suits when it actually contained cocaine. The court downplays the foregoing impeaching evidence simply because defense counsel cross-examined Williams about this false statement at trial. Other circuit courts of appeal have held,

however, that reports are producible even where it affirmatively appears that the entire contents of the report are included in a document which was already turned over to the defense. Ogden v. United States, 303 F.2d 724, 737 (9th Cir. 1962). The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant. Id. at 736-737.

The majority opinion dismissed the impeachment value of the other information in the reports as being too speculative even though the information in the non-disclosed reports do create a possibility sufficient to undermine confidence in the outcome of the case. For instance, the March 18 DEA-6 report could have been used to impeach Williams because therein Williams concocts a completely fabricated tale describing how McLinn purchased a full-service car wash with the proceeds of narcotic trafficking.

While a piece-meal examination of the impeachment value of the evidence in the non-

disclosed reports may not provide reason to believe that a jury would be convinced that Williams was lying, a cumulative assessment of the evidence would create a probability sufficient to undermine confidence in the outcome.

VII.

CONCLUSION

Based upon the foregoing, Petitioner BRADLEY MCLINN respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

Dated: December 1, 1992

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3949

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRADLEY DAVID McLINN,
a/k/a Brian McLinn,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CR 91-095 "E" (3))

Before HIGGINBOTHAM, SMITH, and DeMOSS,
Circuit Judges

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Bradley David McLinn appeals from his conviction and sentence for one count of conspiring to distribute in excess of 50 grams of cocaine base and five counts of using the U.S. mails to distribute cocaine base. We affirm.

I.

McLinn was charged in a six-count indictment with one count of conspiracy to distribute over 50 grams of cocaine base and with five counts of using the U.S. mails to distribute cocaine base. The case was tried to a jury on June 20, 1991. The jury found McLinn guilty on all six counts on the same day. The court denied McLinn's motions for acquittal or for a new trial, and McLinn filed this appeal.

The investigation leading to McLinn's conviction began in January of 1989, when Postal Inspector James Kay discovered an Express Mail package addressed to an unoccupied New Orleans residence. After having a police dog sniff the package, Kay checked the Los Angeles return address on the package and discovered that it was also unoccupied. On this information, Kay obtained a warrant to search the parcel. The search revealed four ounces of crack cocaine.

Kay later discovered several other Express Mail labels mailed from unoccupied or

non-existent Los Angeles addresses to New Orleans. Eleven of these parcels appeared to have been sent by the same person who addressed the January package containing the cocaine. Kay submitted the labels to a crime laboratory in Memphis, Tennessee for handwriting and finger print analysis.

After a Los Angeles postal inspector obtained a handwriting exemplar from McLinn, a Postal Inspection Service handwriting expert concluded that McLinn had addressed the eleven mailing labels previously discovered by Inspector Kay. A forensic print analyst also compared the prints from five labels with McLinn's prints obtained by the Los Angeles Police Department and concluded that the prints matched.

On March 7, 1989, Inspector Kay arrested one James Williams for receiving and attempting to distribute about 670 grams of crack cocaine that arrived at the Post Office in an Express Mail package. With Williams' consent, Kay searched Williams' personal effects and

discovered receipts from two Western Union transfers in the amounts of $2,200.00 and $4,500.00 payable to the order of David McLinn. The sender of the package, Allen Marcel Baber, was also arrested and convicted of distributing cocaine base.

Both Baber and Williams testified at McLinn's trial pursuant to plea agreements. Baber testified at McLinn's trail that he had engaged in the business of dealing cocaine with McLinn for three or four years and that he had introduced McLinn to Williams so that McLinn could take over Baber's business of supplying Williams with cocaine. Williams corroborated this testimony and further testified that he had purchased cocaine through the mails from McLinn on about ten different occasions. The smallest amount that Williams received from McLinn was about four ounces.

The district court sentenced McLinn to concurrent terms of imprisonment of 188 months on the conspiracy count and 48 months on each of the counts charging distribution through

the mails. The district court also imposed concurrent terms of five years of supervised release for the conspiracy count and one year each for each distribution count. Finally, the district court imposed a fine of $20,000.00 and a special assessment of $300.00.

II.

On appeal, McLinn contends that (1) the evidence was insufficient to support the jury's verdict; (2) the district court erred in refusing to allow McLinn to impeach the testimony of James Williams with Williams' two felony convictions; (3) the district court erred in failing to compel production of witness statements under the Jencks Act and Fed. R. Crim. P. 26.2; and (4) the district court erred in determining the total amount of cocaine base used to calculate McLinn's sentence.

A.

McLinn's challenge to the sufficiency of the evidence reduces to an attack on the credibility of Williams and Baber. McLinn concedes that he was paid to address mailing labels and mail the labelled packages to Williams. However, he argues that he believed that the packages contained jewelry and that the wire transfers to him were payment for the jewelry. McLinn discredits the contrary testimony of Williams and Baber by noting that they testified pursuant to plea agreements in order to win more favorable treatment and therefore were not trustworthy. The credibility of the witnesses, however, is a question for the jury. United States v. Puma, 937 F.2d 151, ___ (5th Cir. 1991). There is no merit to McLinn's challenge to the sufficiency of the evidence. United States v. Molinar-Apodaca, 889 F.2d 1417, 1423 (5th Cir. 1989).

B.

McLinn also argues that the district court erred on excluding evidence of Williams' prior felony convictions for impeachment purposes. Williams had been convicted in 1976 and 1979 for receiving stolen property. McLinn gave timely notice that he intended to use these convictions to impeach William' testimony. The government objected to the admission on the ground that the convictions were over ten years old. The district court agreed and excluded the convictions.

The district court revisited this evidentiary ruling in rejecting McLinn's post-trial motion for acquittal or for new trial. The district court found that implicit in its earlier ruling to exclude the 12- and 15-year-old convictions was a finding that "defense counsel had not met its burden under Rule 609 [to show that probative force of the convictions outweighed the convictions' prejudicial impact]."

On appeal, McLinn argues that the district court violated Rule 509(b) in excluding Williams' prior conviction without making specific factual findings on the record about the prejudicial impact and probative value of the stale convictions. We review the district court's evidentiary rulings for abuse of discretion, and, even if abuse is found, the error is not reversible if it is harmless. United States v. Capote-Capote, 946 F.2d 1100, 1104 (5th Cir. 1991).

We find that, even if the district court committed error in excluding Williams' two convictions, such error is harmless. The stale convictions were for receiving stolen property. Such convictions have minimal probative value, because the underlying crimes do not involve false statement or dishonesty. Coursey v. Broadhurst, 888 F.2d 338, 342 (5th Cir. 1989) (felony theft conviction cannot be used for impeachment).

By contrast, Williams admitted during cross-examination that he was testifying

pursuant to a plea agreement, that he had pled guilty to drug dealing, and that, while drug dealing, he placed the names of innocent people, including his sister's name, on envelopes containing drugs without telling them. Williams also admitted that he used several false names, that he had been a pimp for three years and that, while he had been engaging in the drug conspiracy, he broke into a storage facility and stole $70,000.00 from Baber. Finally, Williams testified that he lied to Postal Inspector Kay about the contents of the packages that he shipped.

In light of the jury's knowledge of Williams' history of deceit and crime, there is no significant likelihood that the exclusion of two stale convictions for receipt of stolen goods affected McLinn's substantive rights. See United States v. Newman, 873 F.2d 156, 163 (5th Cir. 1988); United States v. Troupe, 702 F.2d 145, 147 (8th Cir. 1983) (admission of defense witness's prior arrests are harmless error where "[witness's]

cross-examination was littered with testimony that discredited her credibility apart from the previous arrests and conviction"). The exclusion of past convictions, if error, is harmless.

IV.

McLinn argues that the district court erred in not requiring the government to disclose an interview memorandum prepared by Postal Inspector Kay and two DEA-6 Debriefing Memoranda prepared by DEA Special Agent Richards, concerning the agents' interviews with Williams and Baber. According to McLinn, these documents constituted material that had to be disclosed under the Jencks Act, 18 U.S.C. §3500 and Fed. R. Crim. P. 26.2. McLinn also argues that the district court erred in failing to conduct an in camera or "statement adoption" hearing to ascertain whether Williams or Baber ever adopted the statements in the withheld documents.

The Jencks Act requires that after a Government witness has testified, the Government must produce any "statement" of the witness that the Government possesses. United States v. Ramirez, 954 F.2d 1035, 1038 (5th Cir. 1992); 28 U.S.C. §3500(b).[1] The statute defines "statement," in relevant part, to mean "a written statement made by said witness and signed or otherwise adopted or approved by him." 28 U.S.C. §3500(e)(1).[2]

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[1]The Jencks Act provides that, upon a defendant's motion, the district court shall

> "order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness testified."

18 U.S.C. §3500(b)

[2]The Act defines a "statement" as

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> (2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of said statement...."

18 U.S.C. §3500(e).

An agent's interview notes are not "statements" within the meaning of §3500(e)(1) unless the witness signed the notes or otherwise approved the notes after either the notes were read to the witness in their entirety or the witness read all of the notes. United States v. Pierce, 893 F.2d 669, 675 (5th Cir. 1990). See also United States v. Newman, 849 F.2d 156, 160 (5th Cir. 1988). A witness does not adopt interview notes merely because the interviewing agent "continually reread portions to him to ensure their accuracy." United States v. Hogan, 763 F.2d 697, 704 (5th Cir. 1985). Rather, the agent must read the entire document to the witness, and the witness must then approve the document. Id.

Before trial, McLinn requested that the government produce three memoranda--Kay's interview memorandum of his interview with Williams and DEA Richards' two DEA-6 reports of his interviews with Williams and Baber. The district court stated that it would review the

requested material in camera to see if they were Jencks material at the luncheon recess.

Before the luncheon recess, McLinn elicited testimony concerning whether the memoranda requested were adopted by Williams or Baber. Baber testified that he had been interviewed by DEA Agent Richards and Postal Inspector Kay. Baber agreed that Richards took notes during the interview and "would go over his notes with [Baber] to make sure that they were corrects but that Kay did not take notes during the interview. Inspector Kay also testified that he interviewed Williams and that Kay "would seek to verify that the answers he gave to [Kay] were accurate and in response to our questions."

The district court met with McLinn's counsel and the prosecutor in chambers during the luncheon recess to discuss disclosure of potential Jencks material. The record does not indicate that the government produced the requested documents for in camera inspection: the prosecutor told the district court that

"it will take me some time to collect what is not Jencks"--implying that the allegedly non-Jencks material was not present in camera.[3] The district court nevertheless denied McLinn's request for the material. At the request of McLinn's counsel, the district court ordered the government to proffer the documents after trial so that they would be part of the record.

After trial, the district court again addressed the Jencks issue. In denying McLinn's motion for bond pending sentencing, the district court found that the interview reports had not been adopted by the

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[3]The district court found in its order denying McLinn's motion for a new trial that

> " while the record is not clear on this point, the Court's recollection is that the Government was ordered to produce the reports in question during the luncheon recess, that they were produced, and that an in camera inspection did take place, following which the Court denied the defendant's motion for production."

However, the district court conceded at the hearing on McLinn's motion for acquittal or new trial that "the record doesn't reflect that [the documents were actually produced in camera]."

interviewees, noting that the DEA-6 reports were prepared roughly a month after the interviews in which the witnesses allegedly read and approved of the reports. When denying McLinn's motion for acquittal or new trial, the court again found that

> "the three reports in question were the rough notes of the interviewing agents, they were not shown to the interviewees, they did not contain substantially 'verbatim recitals' of the conversations, and they were not adopted or signed by the interviewee witnesses."

On both occasions, the district court reviewed the requested reports, which were appended to the government's opposition to the motions.

We will assume, arguendo that the district court erred in failing to inspect the requested documents in camera during trial. Even so, the district court inspected the documents on two occasions after trial and found that the documents were not Jencks Act material.

Reviewing these post-trial findings for clear error only, we find no clear error. The reports were concise summaries of rough

interview notes. McLinn does not contend that Baber and Williams actually read and approved the reports themselves. Rather, he contends that the witnesses had approved the interview notes on which the reports were based and which were taken a month before the reports were written.

McLinn bears the burden of establishing adoption by a witness. United States v. Merida, 765 F.2d 1205, 1216 (5th Cir. 1985). He introduced no substantial evidence that even the rough interview notes were ever read in their entirety to Baber and Williams. At most, McLinn's evidence shows that DEA Agent Richards "would go over his notes with [Baber] to make sure that they were correct" and that Inspector Kay "would seek to verify that the answers [Williams] gave to [Kay] were accurate and in response to our questions." There was no testimony that any agent ever read the notes in their entirety to any witness. Such a complete reading is required before this court will find that the witness adopted the

notes on which the reports were based. United States v. Newman, 849 F.2d 156, 160 (5th Cir. 1988); Hogan, 763 F.2d at 704.

In the absence of any significant extrinsic evidence that either Baber or Williams adopted the notes, the district court correctly found that the reports based on those notes had not been adopted by the witnesses as their own statement. Newman, 849 F.2d at 160. At best, the reports were concise summaries of factual accounts related to government agents, bearing no sign that they had been formally adopted by any witness through signature or otherwise. We have found that identical reports were not statements within the meaning of the Jencks Act on identical evidence. United States v. Osgood, 794 F.2d 1087, 1092 (5th Cir. 1986).

McLinn argues that he was precluded from eliciting testimony concerning whether the statements were adopted. We disagree. The record shows that, during the noon recess, the government objected to questioning witnesses

on statement adoption in the presence of the jury, because, in the prosecutor's words, such examination suggested that the government was "playing hide the ball." The government explicitly stated that it had no objection to "a hearing on what is Jencks." The district court upheld this objection to further questions on the Jencks Act issue in front of the jury.[4] Such a ruling was proper: it is

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[4]The following discussion took place in the court's chambers at the noon recess:

Gov't.: I think that if [McLinn's counsel] wants to do a hearing to discover if there is additional Jencks material that he hasn't gotten, the middle of trial and in front of the jury is a bad place to do it.... The doesn't belong in front of the Jury.

Court: Well, I agree with that....

. . . .

Gov't.: The point is that [McLinn's counsel] is trying to suggest to the Jury and not too subtly that the Government is playing hide the ball and we are not. If your honor wants to have a hearing on what is Jencks, we are prepared to go forward with that.

. . . .

Court: As far as Williams [a government witness] goes, the guy's going to be cross-examined now.

Gov't.: Right. But I don't want to hear about how you sat in Benson's [the

well-established that Jencks Act issues are usually to be resolved outside the jury's presence. Charles Wright, 2 Federal Practice and Procedure §438, at 602 & n.8 (1982).

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prosecutor's] office and Benson made notes and oh, Jury, he's not showing that.

Court: Your objection in that regard is maintained. It is maintained.

Defense: What does that mean because--

Court: You go into the fact that didn't Mr. Benson talk to you a couple of months [sic] and make notes--

Defense: I shouldn't go into that on Williams?

Court: Well, you can ask Williams who he talked to.

Gov't: The same with the agent.

Court: Everybody knows he talked with the agent.

Govt.: But the way Mr. Brooklier [McLinn's counsel] is handling this thing through the Jencks Act situation, did he read his notes back to you.

Court: That is out.

Defense: But, Judge, if he did, that makes it Jencks

Court: That is out.

The court never ruled that McLinn could not examine one witnesses outside the presence of the jury on the Jencks Act issue. Such a hearing would certainly have been appropriate, had McLinn ever requested it. However, McLinn never clearly requested it. Absent a request, the district court was not obligated to hold a statement adoption" hearing. Osgood, 794 F.2d at 1087; Merida, 765 F.2d at 1216.

The preferable practice would be for the district court to examine witnesses briefly outside the presence of the jury to determine whether the witness had read or heard the interview notes and whether the witness had later indicated that he verified the accuracy of the notes. Merida, 765 F.2d at 1216 n.7. Absent a clear request for a hearing, the district court did not err in determining whether the statements were adopted simply from examining the documents themselves.

V.

McLinn also contends that the government's failure to disclose the three requested memos denied him due process under Brady v. Maryland, 373 U.S. 83 (1963). To support a grant of a new trial the evidence that the prosecution failed to disclose must be "material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87-88 (1963). Evidence is not material unless, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 105 S. Ct. 3375, 3383 (1985). Bagley explained that "a 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id.

McLinn argues that five remarks in the undisclosed memoranda contained material impeaching information. Failure to disclose impeaching evidence can constitute a Brady violation. Giglio v. United States, 405 U.S.

150, 154 (1972); United States v. Martinez-Mercado, 888 F.2d 1484, 1488 (5th Cir. 1989).

However, the impeachment value of the information cited by McLinn is insignificant. None of the reports contain statements that contradict either Baber's or Williams' trial testimony.[5] The jury was made aware of the only significant impeaching evidence--that Williams initially lied to Inspector Kay about the contents of a package, telling Kay that the parcel contained jogging suits when it actually contained cocaine. McLinn cross-examined Williams vigorously about this false statement at trial.

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[5]McLinn argues that the March 12 DEA-6 report contradicts Baber's trial testimony, because the DEA report describes Baber as acknowledging that he and McLinn "had a disagreement in early 1989 and quit distributing cocaine together." At trial, Baber agreed that he "had arguments together [with McLinn]," but Baber denied that he had ever argued with McLinn "about who was going to send crack cocaine to Mr. Williams." Nothing in the March 12 report contradicts this statement, because the March 12 report does not mention the subject of the argument between McLinn and Baber.

The impeachment value of the other information in the reports is speculative. Kay's March 7, 1989 memo reports that Williams told Kay that he had mailed $1,000.00 in cash to one "Al Bee." McLinn argues that he could have cross-examined Williams about his relationship with Al Bee and possibly impeached Williams by showing that Williams was trying to protect "Al Bee" with his testimony. However, it is pure speculation that Williams was trying to protect Al Bee. Nothing in the report supports this inference. The memorandum simply indicated that Williams told agents that he had mailed money to Al Bee--an unexceptional statement, given that it was undisputed that Williams used the mails to send money to people to pay for drugs.

McLinn also argues that the March 18 DEA-6 report could have been used to impeach Williams, because it describes Williams as stating that McLinn owned a full-service car wash purchased with the proceeds of narcotic trafficking, a statement that McLinn contends

is false. McLinn argues that, had he been given the March 18 report, he could have impeached Williams by proving that Williams had lied about the car wash in his interview with the DEA.

Again, it is pure speculation that McLinn would have convinced the jury that Williams was lying, rather than simply mistaken, about the car wash. Moreover, the jury already knew that Williams had lied to government agents. At best, the statement about the car wash is weak, cumulative impeaching evidence.

VI.

McLinn finally argues that the district court erred in adopting the presentence report's finding that the conspiracy involved 563.1 grams of crack cocaine. McLinn notes that only 109.7 grams of crack cocaine were ever recovered. Therefore, McLinn contends that his base offense level under the guidelines should be reduced accordingly.

We review the district court's factual findings made in sentencing for clear error only. United States v. Chavez, 947 F.2d 742, 746 (5th Cir. 1991). We find no clear error in the challenged finding. McLinn was convicted of five counts of distributing cocaine base through the mails. At trial, Williams testified that he had received ten shipments of crack cocaine from McLinn and that these shipments always contained at least four ounces. The Presentence report stated this testimony as its basis for finding that McLinn had distributed 563.1 grams of crack cocaine.

Williams' testimony had sufficient indicia of reliability to be a basis for the sentence recommended by the Presentence report and adopted by the district court. United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1990). McLinn simply contends that Williams' testimony was not reliable. We cannot say, however, that the district court clearly erred in crediting it. United States

v. Alfaro, 919 F.2d 962, 967 (5th Cir. 1990).

AFFIRMED.

A true copy
Test

Clerk
U.S. Court of Appeals
Fifth Circuit

by /s/
Deputy

New Orleans, Louisiana

SEP 21 1992

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3949

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRADLEY DAVID McLINN, a/k/a Brian McLinn,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(September 10, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge